United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

75-4237

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P/S

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

LOCAL 445, INTERNATIONAL UNION
OF ELECTRICAL, RADIO AND
MACHINE WORKERS, AFL-CIO,

Respondent.

SPERRY SYSTEMS MANAGEMENT DIVISION,
SPERRY RAND CORPORATION,

Intervenor.

Petition for Enforcement of an Order
of
The National Labor Relations Board

INTERVENOR'S BRIEF

Dated: New York, New York
November 25, 1975

Of Counsel:
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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

NATIONAL LABOR RELATIONS BOARD, Petitioner,	:	
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Preliminary Statement

This case is before the Court -- for the second time -- upon the application of the National Labor Relations Board ("the Board"), filed October 31, 1975, for summary entry of a judgment enforcing the Board's Supplemental Decision and Order dated January 16, 1975, as amended (with the consent of Intervenor, Sperry Systems Management Division of Sperry

Rand Corporation ("the Company")) by the Board's Order dated June 4, 1975. The Supplemental Decision and Order, as so amended, enjoins the Respondent, Local 445, International Union of Electrical, Radio and Machine Workers, AFL-CIO ("the Union"), to cease and desist, and to post notices that it will cease and desist, from

> "(a) Using, or attempting to use, the grievance and arbitration procedures established by its collective-bargaining agreement with Sperry Systems Management Division, Sperry Rand Corporation, covering the unit of Metropolitan New York City area employees described below, for the purpose of compelling Sperry Rand to apply the substantive terms of that agreement to unrepresented technical employees engaged by that Company at its Vallejo, California, plant.
>
> "(b) In any other manner using the collective-bargaining process as established for the unit of th below-described employees as a means of protesting or otherwise determining the wages, hours, and working conditions of unrepresented employees at Sperry's Vallejo, California, facilities.
>
> "(c) Attempting in any like or related manner to expand its established collective-bargaining relationship beyond the bounds of the unit composed of the following employees:
>
> [The Board here quotes the Metropolitan New York area unit description contained in the Board certification issued to the Union in 1962, augmented to include all of the classifications thereafter added to the unit and listed in the parties' 1970 contract.]"

The Union opposes enforcement of paragraph (c) only, in respect to classifications of Company employees within

the Metropolitan New York area but not listed in the 1962 certification or the 1970 contract. In essence, we understand, the Union does not dispute that it will not be free, under the Supplemental Order, to use the New York grievance-arbitration procedures and collective-bargaining process to expand the contract unit outside the Metropolitan New York area, but it wants to be free under the Order to use those means to expand its unit within that area. The Company supports the Board's application in full.

The Court's Prior Decision, and Subsequent Board Proceedings

This case was first before the Court upon the Company's petition, filed April 30, 1973, for review of a Board majority's initial Decision and Order dated March 5, 1973 (NLRB Case No. 29-CB-1199, 202 NLRB No. 18). That Decision and Order dismissed an unfair labor practice complaint alleging that the Union refused to bargain, in violation of Section 8(b)(3) of the National Labor Relations Act, by its various efforts to utilize the grievance and arbitration provisions of its collective bargaining agreement with the Company covering Company employees in a Metropolitan New York City area bargaining unit, to enforce an arbitration

award directing the Company to apply the substantive provisions of that agreement to Company employees (in Vallejo, California) not within that unit.

By its decision dated February 15, 1974, the Court granted the Company's petition for review, voided the Board majority's Order, and remanded the case to the Board "for further proceedings consistent with this opinion." Sperry Systems Management Division v. N.L.R.B., 492 F.2d 63, 70 (1974), cert. den., 419 U.S. 831 (1974).

The Court's opinion contained two independent and alternate holdings:*

1. That "the Board's finding that the Union's efforts [to enforce the arbitration award] were motivated by a desire to protect the job security of the Long Island employees and not by a desire to represent the Vallejo [California] employees was not supported by substantial evidence" (492 F.2d at 68), and that "[t]he only reasonable conclusion is that the Union was seeking to represent the Vallejo [California] employees through . . . the grievance procedures in New York" (492 F.2d at 68) and thereby violated Section 8(b)(3) of the Act; and

*The Court also ruled that "Demands by a union to represent employees outside the . . . [unit] are unfair labor practices even if no disruption [of the New York collective bargaining relationship] occurs" (492 F.2d at 67, n. 4) (emphasis added), and that it was no defense that the Union's efforts to apply the New York agreement to the California employees were efforts to enforce an arbitrator's award "because his award was repugnant to the Act." (492 F.2d at 70, n. 8)

2. That "regardless of the Union's motive in seeking enforcement of the arbitration award" (492 F.2d at 69), its efforts to do so constituted efforts to bargain in the New York unit over wages and working conditions of Company employees in California, and thereby violated Section 8(b)(3), because "the subject of the wages and working conditions of the Vallejo employees was not a permissible subject of bargaining in the New York City unit" (492 F.2d at 69).

Subsequent to the Court's decision, the Union unsuccessfully petitioned the Supreme Court for certiorari and the Board, on January 16, 1975, then issued its Supplemental Decision and Order (Document 18).* The Union then twice unsuccessfully moved the Board to modify "by making it clear that the Respondent is not precluded from expanding its collective bargaining relationship beyond the bounds of the current collective bargaining agreement by securing recognition for additional occupations through the processes of

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*Citations to "Documents" refer to the items listed in the Certificate of the National Labor Relations Board herein, dated October 29, 1975.

accretion, recognition, negotiation or grievance settlement" (Document 19, Respondent's Motion to Amend and Modify Supplemental Decision and Order, dated February 4, 1975, p. 2; Document 23, Respondent's Motion to Further Amend and Modify Supplemental Decision and Order, dated July 3, 1975, p. 2); it is that Order which the Board has now applied to this Court to enforce.

The Modification Sought by the Union

Ordering paragraphs (a) and (b) of the Board's Supplemental Decision and Order enjoin the Union from using the New York grievance-arbitration procedures or collective-bargaining process in respect to Company employees at Vallejo, California. The Union states, disingenuously, that it "is fully prepared to comply" with these paragraphs (Affidavit in Opposition, para. 3, p. 2) - the Company no longer operates any facility in Vallejo, California (see Document 22, p. 2, n. 3).

Ordering paragraph 1(c), which enjoins the Union from using the New York grievance-arbitration procedures and collective-bargaining process to "expand its established collective-bargaining relationship beyond the bounds of the [contract] unit", is the target of the Union's opposition to the Board's present application to the Court, in two stated respects.

First, the Union opposes enforcement because the unit description in ordering paragraph (c), which is essentially the same as the unit description in the 1970 contract, does not list certain classifications added to the unit by a series of Company-Union agreements made after the date of execution of the contract (June 5, 1970).* On November 20, 1975, however, the Company filed with the Board's Region 29 in Brooklyn a Unit Clarification ("UC") petition, requesting the Board to update the Union's 1962 certification

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*The Board disposed of that objection in its Order dated August 28, 1975, denying the Union's second motion to modify the Board's Supplemental Order, as follows:

> "1. The portion of the motion in which requests that certain changes be made in the classifications as now listed in the unit description in paragraph 1(c) of the Board's Order is explicitly opposed by the Charging Party and appears in effect to be based on the alleged negotiated agreements which are not part of the formal record and which, in any event, appear to have been made at dates preceding the February 7, 1975 motion referred to above [the Union's first motion to modify the Board's Supplemental Order] and thus, do not constitute matters which previously were not known to Respondent."

so as to include all of the classifications added to the unit since 1962, including both those listed in the 1970 contract and those added subsequently (NLRB Case No. 29-UC-81). Presumably, the Union will consent to the Company's petition, and the Regional Director then approve the petition, mooting any Union objection to the absence of the post-1970 classifications from the Board's Supplemental Order herein.

The Union's second and principal ground of opposition to ordering paragraph (c), urged to the Board twice and rejected by it twice, is this:

> "a literal reading of Ordering ¶1-C would appear to forbid the respondent from expanding the classifications of Metropolitan New York City area employees through the traditional and lawful collective bargaining processes of recognition, negotiation, grievance settlement and accretion" (emphasis added). (Affidavit in Opposition of Everett Lewis, Esq., sworn to November 11, 1975 (hereafter "Lewis Aff."), para. 3, p. 3.)

The Union's so-called "literal reading" of paragraph (c) escapes us: paragraph (c) does not deny to the Union either the processes of lawful "recognition" or the process of "accretion", i.e., unit clarification, as defined by the Board. It does deny to the Union the processes of "negotiation" and "grievance

settlement" as means of expanding the New York unit, even within the Metropolitan New York area.

The Board dealt with the Union's objection, in its Order dated August 28, 1975, as follows:

> "2. The request for additional modifications to paragraph 1(c) of the Board's Order is a repetition, in effect, of the request contained in the earlier motion filed by Respondent on February 7, 1975. It contains nothing not previously considered by the Board in its deliberations on the matter.3/

3/ Should changes in conditions occur which, in Respondent's view, require amendment of the unit definition, Respondent, of course, has available to it the unit clarification procedures of the Board. The Board's Order, which speaks for itself, in no way limits Respondent's access to these clarification procedures."

Commenting upon that footnote, the Union now complains that "there is no reason why the respondent should be penalized by being denied the use of normal collective bargaining procedures to keep its unit description up to date for insofar as the Metropolitan New York area employees are concerned, there is no evidence that those processes have in the past been abused." (Lewis Aff., para. 4, pp. 3-4) From this comment, and other statements in the Union's Affidavit in Opposition, we understand the particular modification of the Board's

Supplemental Order sought by the Union from this Court to be amendment of ordering paragraph 1(c) so as to enjoin the Union from

> "(c) Attempting in any like or related manner to expand its established collective-bargaining relationship beyond the bounds of the Metropolitan New York area."

The Company opposes that or any similar modification.

ARGUMENT

PARAGRAPH 1(c) OF THE BOARD'S ORDER IS NOT OVERBROAD, AND SHOULD BE ENFORCED

A. The Board Has Broad Remedial Powers

The statutory framework of this proceeding is Section 10(c) of the Act, which requires the Board, where it has found an unfair labor practice, to issue "an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action . . . as will effectuate the policies of this Act", and Section 10(e), which empowers a United States Court of Appeals, where the Board has petitioned for enforcement of such an order, "to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board."

With respect to Sections 10(c) and (e) "it is well settled that the Board's discretion in formulating appropriate remedial relief is broad and that the scope of judicial review is narrow." N.L.R.B. v. Local No. 106, Glass Blowers Ass'n, AFL-CIO, 520 F.2d 693 , 89 LRRM 3020, 3022 (6th Cir., July 22, 1975) (enforcing a Board order

merging two sex-segregated local unions, over union contention of interference in internal union affairs); see N.L.R.B. v. J.W. Mays, Inc., 518 F.2d 1170, 1171 (2d Cir., June 30, 1975).*

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*Just how narrow the scope of judicial review is, is indicated by the Supreme Court's statement in Virginia Electric & Power Co. v. N.L.R.B., 319 U.S. 533, 540 (1943), that a court will not decline to enforce a Board remedial order in an unfair labor practice case "unless it can be shown that the order is a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act." More recently, the Supreme Court has stated that: "In fashioning its remedies under the broad provisions of Section 10(c) of the Act (29 U.S.C. 160(e)), the Board draws on a fund of knowledge and expertise all its own, and its choice of remedy must therefore be given special respect by reviewing courts." N.L.R.B. v. Gissel Packing Co., 395 U.S. 575, 612, n. 32 (1969)

B. The Board's Order in This Case Was a Proper Exercise of Discretion

The Union's complaint to the Court apparently is that the Board's ordering paragraph (c) is overbroad in that it enjoins grievance-arbitration and collective-bargaining activities for the purpose of expanding its bargaining unit within the Metropolitan New York area. As to such a charge, however, paragraph (c) easily meets the Supreme Court's standard, enunciated in N.L.R.B. v. Express Publishing Co., 312 U.S. 426 (1941):

> "Having found the acts which constitute the unfair labor practice the Board is free to restrain the practice and other like and related acts." (312 U.S. at 436) (emphasis added)*

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*N.L.R.B. v. Express Publishing Co. also holds that, in some cases, the Board may enjoin violations of provisions of the Act other than the provision found to have been violated:

> "We hold only that the National Labor Relations Act does not give the Board an authority, which courts cannot exercise, to enjoin violations of all the provisions of the statute merely because the violation of one has been found. To justify an order restraining other violations it must appear that they bear some resemblance to that which the employer has committed or that danger of their commission is to be anticipated..." N.L.R.B. v. Express Publishing Co., 312 U.S. 426, 437 (1941)

[Footnote continued on following page.]

The Union cannot credibly deny that using the New York grievance-arbitration procedures and collective bargaining process to expand its bargaining unit within the Metropolitan New York area is "like or related to" the violations found by the Court in respect to the Vallejo, California employees.

[Footnote continued from preceding page.]

That standard is inapplicable in the instant case, because the Board's order is not (and is not attacked as) an order enjoining violations of provisions other than Section 8(b)(3), which is the provision found to have been violated by the Union in this case.

May Department Stores Co. v. N.L.R.B., 326 U.S. 376 (1945), confirms that the alternate "some resemblance" or "future danger" tests set forth in Express Publishing were intended for cases where the Board enjoins violations of one provision of the statute (Section 8(a)(1) in May and in Express) after finding violation of another (Section 8(a)(5) in both). In cases of the instant sort, where the Board did not enjoin violation of some provision of the statute other than the one found to be violated, the applicable test under Express Publishing is whether the proscribed acts are "like or related" to the violations found.

Under the Board's Order the Union, exactly as it now claims, will be "denied the use of normal collective bargaining procedures to keep its unit description up to date" (Affidavit in Opposition, para. 4, p. 4). That consequence, however, flows from the Union's own found misconduct.* There is ample authority, moreover, for denying access to normal collective bargaining procedures to an employer or a union which has abused those procedures and been found guilty of an unfair labor practice. See, e.g., International Ladies Garment Workers Union v. N.L.R.B., 366 U.S. 731 (1961), enforcing a Board order (122 NLRB 1289, 1294-7 (1959)) where an employer and a union were found to have violated the Act by executing and maintaining a collective bargaining agreement covering the employer's production and shipping employees at its San Antonio, Texas plant at a time when the union lacked majority representative status among said

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*Any reliance by the Union on Carey v. Westinghouse, 375 U.S. 261 (1964) is misplaced. The fact that representation issues may sometimes be raised in the contractual grievance and arbitration process does not prohibit the Board, in the exercise of its broad, statutory remedial authority, from limiting a union's access to that process.

employees. The Board's Order prohibited the employer from recognizing the union as the representative of any of its employees and prohibited the union from acting as the bargaining representative of any of the employer's employees, "unless and until the said labor organization shall have demonstrated its exclusive majority representative status pursuant to a Board-conducted election among the Company's employees" (122 NLRB at 1295 and 1296). Thus, in ILGWU found violators of the Act, as well as employees (including but not limited to the affected employees), were denied access to the normal collective bargaining procedure of voluntary recognition, and confined instead, for recognition purposes, to the Board's formal processes for certification of representatives. In the present case, analogously, a found violator of the Act, the Union, has been denied access to the procedures of negotiations and grievance-arbitration, for purposes of expanding its unit, and is relegated and confined instead to the process of voluntary employer recognition for new classifications of employees, or, if and when the Company declines such recognition, to the Board's formal processes for clarification of certifications. The Board's Order leaves intact the Union's substantive right under the Act to expand its unit by a Board unit-

clarification proceeding in cases where the Company declines voluntary recognition with respect to classifications not within the contractual or certified unit.

Finally, there is ample evidence in this record of the Union's abuse of the New York contractual grievance-arbitration procedures -- using them for the purpose of illegally expanding the bargaining unit -- notwithstanding the Union's protestations to the contrary in its Affidavit in Opposition (Lewis Aff., para. 4, p. 4). First, as this Court found (492 F.2d at 65), the Union filed a grievance, in November 1970, demanding that the Company apply the New York agreement to the Vallejo, California employees, and pursued it to arbitration. That case resulted in the arbitration award directing the Company to apply the substantive terms of the agreement to those employees, which award (a) the New York courts set aside as violative of the Act, and (b) this Court found "repugnant to the Act" (492 F.2d at 70, n. 8). Second, also as the Court found (492 F.2d at 65-66), the Union attempted to enforce the award and filed <u>another</u> grievance, on July 26, 1971, demanding that the Company comply with the

award and further demanding that it recall two laid-off employees, pursued it through the grievance procedures and requested arbitration. The Court found those efforts to constitute (a) violation by the Union of Section 8(b)(3) of the Act, and (b) an attempt by the Union to require the Company to impinge on the rights of the Vallejo employees in violation of Sections 8(a)(1) and (2) of the Act. This record proof of a course of abuse by the Union of the New York collective-bargaining procedures justifies the Board in adopting, and this Court in enforcing, ordering paragraph (c). Cf. N.L.R.B. v. Associated Musicians of Greater New York, Local 802, 422 F.2d 850 (2d Cir. 1970).

CONCLUSION

The Court should make and enter a decree enforcing the Board's Supplemental Decision and Order, as amended.

Dated: New York, N.Y.
November 25, 1975

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

NATIONAL LABOR RELATIONS BOARD, Petitioner,	:	
-against-	:	
LOCAL 445, INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO, Respondents.	:	Docket No. 74-4237 AFFIDAVIT OF SERVICE
SPERRY SYSTEMS MANAGEMENT DIVISION, SPERRY RAND CORPORATION, Intervenor.	:	

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

MADELINE NESSE, being duly sworn, deposes and says:

I am not a party to this action; I am over 18 years of age and I reside at 304 East 18th Street, New York, New York 10003.

On the 24th day of November, 1975, I served the annexed Intervenor's Brief on Petitioner by depositing two true copies thereof in an official United States Mail Depository with sufficient postage prepaid and addressed to Elliott Moore, Esq., Deputy Associate General Counsel, National Labor Relations Board, Washington, D.C.

Sworn to before me this
24th day of November, 1975.

Eric Douglas Witkin
Notary Public

ERIC DOUGLAS WITKIN
Notary Public, State of New York
No. 31-4503330 Qual. in N. Y. Co.
Term Expires March 30, 1977

Madeline Nesse
MADELINE NESSE

Copy Received.
Dated: Nov. 24 1975
Vladeck, Elias, Vladeck & Lewis
By Everett C. Lewis / & J. Swearingen
Attorneys for Respondent